Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an African-American employee, claims that petitioner violated Title VII of the Civil Rights Act of 1964 by paying her less than similarly situated white employees. Her disparate pay resulted from allegedly discriminatory acts that occurred before the 300-day limitations period set forth in Section 706(e) of Title VII. The court of appeals nevertheless held that respondent's claims were actionable because employee paychecks represent "a continually recurring series of violations, each of which is separately actionable under Title VII." The court of appeals also held that in such cases the employee is entitled to two years — not just 300 days — worth of backpay. The questions presented, on which the courts of appeals are divided, are as follows:

1. Whether pay differentials resulting entirely from allegedly discriminatory acts that occurred prior to the Section 706(e) limitations period are actionable under Title VII.

2. If so, whether backpay is properly limited to the Section 706(e) limitations period or instead may be awarded for a two-year period prior to the filing of a charge.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner General Motors Corporation has no parent corporation, and no company owns 10 percent or more of its common stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULES 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

A. Respondent's Discrimination Claim 4

B. The Decision Of The District Court 7

C. The Decision Of The Court Of Appeals 8

REASONS FOR GRANTING THE WRIT 10

I. The Tenth Circuit's Decision Allowing Pay Discrimination Claims Without Regard To The Time Of The Alleged Discrimination Conflicts Sharply With Decisions Of Other Courts Of Appeals. 12

TABLE OF CONTENTS — Continued

Page

II. The Tenth Circuit's Decision Cannot Be Reconciled With This Court's Decisions Treating The Date Of Discrimination As Dispositive For Statute Of Limitations Purposes 17

III. This Court Should Also Resolve A Significant Circuit Conflict Over The Period Of Time For Which Backpay Is Available Under Title VII. . 23

IV. This Court's Review Is Needed To Maintain Consistency In The Formulation Of Title VII Timeliness Rules. 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Ashley v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164 (8th Cir. 1995) 16

Baldwin County Welcome Ctr. v. *Brown*, 466 U.S. 147 (1984) 25, 27

Bazemore v. *Friday*, 478 U.S. 385 (1986) . . . . . *passim*

Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 25

Bosley v. *Merit Sys. Protection Bd.*, 162 F.3d 665 (Fed. Cir. 1998) 14

Brinkley-Obu v. *Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994) 16

Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) 26

Calloway v. *Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993) 16

Cardenas v. *Massey*, 269 F.3d 251 (3d Cir. 2001) . 16

Carter v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000) 9, 16

TABLE OF AUTHORITIES — Continued

Page

Chardon v. *Fernandez*, 454 U.S. 6 (1981) 19

Dasgupta v. *University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997) . 3, 9, 11-14

Delaware State College v. *Ricks*, 449 U.S. 250 (1980) 18, 19, 21, 22, 26

Edelman v. *Lynchburg College*, No. 00-1072 (Mar. 19, 2002) 26

Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) . . . 27

Hamilton v. *1st Source Bank*, 928 F.2d 86 (4th Cir. 1990) 28

Hazelwood Sch. Dist. v. *United States*, 433 U.S. 299 (1977) 21

International Union of Elec. Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 27

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 24, 29

Lorance v. *AT&T*, 490 U.S. 900 (1989) . . . 19, 21, 22

Madison v. *IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001) 23

TABLE OF AUTHORITIES — Continued

Page

National R.R. Passenger Corp. v. *Morgan*, No. 00-1614 . . . . . 2, 30

Niedermeier v. *Office of Max S. Baucus*, 153 F. Supp. 2d 23 (D.D.C. 2001) 15

Pollis v. *New Sch. for Social Research*, 132 F.3d 115 (2d Cir. 1997) 16

Snider v. *Belvidere Township*, 216 F.3d 616 (7th Cir. 2000) 13

Tademe v. *St. Cloud State Univ.*, 2001 WL 1584593 (D. Minn. Dec. 10, 2001) 14

United Air Lines, Inc. v. *Evans*, 431 U.S. 553 (1977) 17, 18, 21-23

United States v. *Ibarra*, 502 U.S. 1 (1991) 28

United States v. *Kubrick*, 444 U.S. 111 (1979) 27

Williams v. *Munoz*, 106 F. Supp. 2d 40 (D.D.C. 2000) 15

Young v. *United States*, 122 S. Ct. 1036 (2002) . . . 26

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 24

TABLE OF AUTHORITIES — Continued

Page

Zipes v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) 2

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-5(e)(1) . . . . . *passim*

42 U.S.C. § 2000e-5(g)(1) 24

Miscellaneous:

H.R. Rep. No. 92-238 (1971) 24

Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. (Autumn 1986) 27

Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW 1355 (3d ed. 1996) 22

U.S. Dept. of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98* 26

Lisa Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531 (2000) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 275 F.3d 1005. The district court's opinion granting summary judgment to GM (App., *infra*, 18a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2002. App., *infra*, 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

Section 706(e) of Title VII of the Civil Rights Act of 1964 requires that a charge of discrimination be filed with the EEOC within 180 days of the alleged discriminatory act or, as in this case, within 300 days in states where a state or local agency has the authority to grant relief from discriminatory practices. 42 U.S.C. § 2000e-5(e)(1). This time limit "operate[s] as a statute of limitations." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394-395 & n.12 (1982).

In *National R.R. Passenger Corp.* v. *Morgan*, No. 00-1614, this Court currently is reviewing the Ninth Circuit's holding that the "continuing violation" doctrine permits a claim based on discriminatory conduct that occurred prior to the limitations period so long as it is "related to" discriminatory conduct occurring during the limitations period. As Justice O'Connor noted in the oral argument in *Morgan*, there is a "lopsided split" in the courts on that issue. Jan. 9, 2002 Tr. 31, 52.

However *Morgan* is decided, a significant circuit split will remain on the equally important and closely related issues raised in this case. The decision below rested on a supposed exception to the general rule that discriminatory conduct prior to the limitations period is not actionable even if it produces disparate effects during the limitations period. This purported exception applies when the claim is one for discriminatory pay. In such cases, according to the court below, each paycheck represents a separately actionable violation of Title VII, even if it results entirely from pre-limitations discrimination and a neutral pay policy during

the limitations period. The Tenth Circuit's holding squarely conflicts with *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), in which Judge Posner writing for the Seventh Circuit rejected the argument that a lower salary resulting from pre-limitations discrimination is actionable under Title VII. The decision below also conflicts with decisions of other federal courts and with principles set forth in this Court's precedents addressing the timeliness of Title VII claims.

The court below relied for its ruling on a sentence from this Court's opinion in *Bazemore* v. *Friday*, 478 U.S. 385, 395-96 (1986): "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII" (opinion of Brennan, J., joined by all members of the Court). The court of appeals ignored *Bazemore*'s restriction of that pronouncement to cases where the employer actively engaged in discriminatory practices during the period when a Title VII claim is actionable. As the Seventh Circuit and other federal courts have recognized, *Bazemore* does not authorize treating pay differentials under timeliness rules different from those applicable to other disparate effects that result entirely from pre-limitations discrimination.

The Tenth Circuit compounded its deviation from the law recognized in other circuits by authorizing backpay for a two-year period prior to the filing of plaintiff's charge with the EEOC. Consistency (both logical and statutory) requires that, even if pay disparities resulting solely from pre-limitations discrimination are separately actionable,

backpay should be available only for the 180- or 300-day limitations period established by Section 706(e).

Clear and consistent rules governing the timeliness of EEOC charges and Title VII claims are critically important both to employers and employees. Grafting a tangle of exceptions based on subject matter — pay, promotions, or seniority — onto filing deadlines would be inconsistent with the text and purposes of Section 706(e). Because adverse employment actions commonly result in lower pay throughout an employee's career, allowing each paycheck to revive pre-limitations sources of present pay disparities would effectively nullify the statute of limitations. This Court's intervention is required to ensure that the above-quoted sentence from *Bazemore* not be removed from its context to generate needless confusion on an important threshold requirement for all discrimination claims.

A. Respondent's Discrimination Claim

Respondent Pamela Goodwin, an African-American labor relations representative at General Motors, sued GM for racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, claiming disparate treatment in the form of a salary lower than the salaries of similarly situated white labor relations representatives. As the district court found, the facts relating to the timeliness of her claim "are largely uncontroverted." App., *infra*, 22a.

Goodwin began working for GM in 1976 at its Leeds plant in Kansas City, Missouri. In 1978, she was promoted to supervisor of janitors, a salaried sixth-level position. Goodwin was laid off for two months in June 1980 and,

when recalled, was assigned to a fourth-level clerk position with an 11 percent reduction in salary. App., *infra*, 22a-23a.

Goodwin was laid off again in September 1982 and recalled six months later as a fourth-level clerk performing the duties of a company car coordinator, which at other GM plants was a sixth-level position. App., *infra*, 23a. While working in that position, she was denied a promotion in 1983 on the ground that the Leeds plant was going to be closed. *Ibid.* After being laid off again when GM closed its Leeds plant in August 1987, Goodwin was rehired two months later as a temporary security guard at GM's Fairfax plant in Kansas City, Kansas. *Ibid.* In February 1988, she accepted a position as a clerk in the Fairfax labor relations department. Although she had been told that the clerk position was a fifth-level permanent position, she was placed as a fourth-level temporary clerk with a salary below what she had received as a fourth-level clerk at Leeds. *Ibid.* GM subsequently made Goodwin's position permanent and, in early 1989, promoted her to fifth-level clerk. *Ibid.* In December 1991, GM promoted Goodwin to sixth-level labor relations representative. *Id.* at 24a. When her shift was eliminated in April 1992, she was placed in a fifth-level clerk position with no loss in pay. *Ibid.* In December 1993, she was recalled to her sixth-level position as labor relations representative, a position she continues to hold. *Ibid.*

Goodwin's initial labor relations representative salary was set at more than $300 per month lower than the lowest paid of the other representatives and more than $500 less than the highest paid. App., *infra*, at 5a. At that time, all three of the other labor relations representatives were white.

Although none of the four representatives stood "'head and shoulders' above the rest," due to percentage increases received between 1994 and 1997 the disparity between Goodwin's pay and the other representatives' pay grew larger. *Ibid.* In 1997, Goodwin was being paid $547 less per month than the next lowest paid representative. *Ibid.*

In April 1996, after hearing that a white fifth-level clerk was earning more than she, Goodwin expressed concerns about her compensation level to Tim Danahy, GM's plant personnel director. He assured her that her salary was higher than the clerk's. App., *infra*, at 28a. She then requested larger raises to bring her salary closer to what she believed was the "market range" for her position, a request that GM denied. *Ibid.* At some point between 1992 and 1996, Goodwin also requested a pay raise from Sam Hassler, the general supervisor of the plant's labor relations department, on the ground that her compensation was below the "market range" for her position, which he denied. *Ibid.*[1]

In March 1998, Goodwin found a printout listing the salaries of each of the four representatives and asked GM to explain the disparity. App., *infra*, 6a. In June 1998, GM offered Goodwin a 5 percent annual raise and asked her to sign a statement acknowledging that she had received all the compensation due her. She refused and did not receive the raise. *Ibid.* Other than her complaints about job classifications, raises, and compensation, Goodwin does not

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[1] Mr. Hassler has since died and Mr. Danahy has retired. C.A. App. 122.

recall "any specific discriminatory acts or statements" by any of her supervisors at GM. *Id.* at 29a.

On September 22, 1998, Goodwin filed an employment discrimination charge with the EEOC. App., *infra*, 6a. After receiving a right to sue letter, she sued in the United States District Court for the District of Kansas. Goodwin claimed that GM discriminated by paying her less than similarly situated white employees, forcing her to accept pay decreases when she was recalled from lay-offs in 1980 and 1987-88, failing to promote her in 1983, and providing discriminatory annual raises after 1993. App., *infra*, at 33a.

B. The Decision Of The District Court

After completion of discovery, GM moved for summary judgment. The district court ruled that, because Goodwin filed her charge with the EEOC on September 22, 1998, it could not consider acts occurring more than 300 days before that date, that is, acts occurring prior to November 26, 1997. App., *infra*, 31a. Thus, with the exception of the raise offered in June 1998, Goodwin's allegations were untimely. *Id.* at 42a. The district court rejected Goodwin's plea for application of the "continuing violation" doctrine. First, the court found an insufficient relationship between the pay decreases that Goodwin received in the 1980s and the pay disparities that continued into the limitations period. *Id.* at 33a. Second, the court found that those pay disparities were simply "the lingering effect" of decisions made prior to the limitations period and thus, based on established principles, were not actionable. *Id.* at 39a. Third, the court found "no evidence that GM ever

compared the aggregate level of her salary to that of her co-workers" or otherwise engaged in or intended to engage in discrimination during the limitations period. *Id.* at 37a. The court also rejected Goodwin's arguments for equitable tolling of the statute of limitations, finding that she had been on notice of GM's alleged salary discrimination for "at least two years before she filed a charge with the EEOC." *Id.* at 42a.

Finally, the district court held that the June 1998 pay raise, the only purportedly discriminatory act occurring within the limitations period, did not establish a *prima facie* case of disparate treatment because all the affected employees were offered the same percentage pay increase (which Goodwin turned down). The court therefore granted summary judgment to GM. App., *infra*, 46a.

C. The Decision Of The Court Of Appeals

The Tenth Circuit reversed. In an opinion by District Court Judge Milton Shadur sitting by designation, the court of appeals recognized that continuing effects of discriminatory acts that took place prior to the 300-day limitations period "are generally not actionable under Title VII." App., *infra*, 7a. However, it ruled that in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court established a "crucial distinction" in cases involving discriminatory pay rates. *Ibid.*

The court of appeals focused in particular on this language from *Bazemore*, 478 U.S. at 395: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." According to the court below, that language "articulated

what remains the basic rule as to pay discrimination claims": "pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII." App., *infra*, 8a. The court concluded that "each race-based discriminatory salary payment constitutes a fresh violation of Title VII," even if the allegedly discriminatory conduct that caused the discriminatory salary payment — in this case employment decisions from the 1980s and early 1990s — occurred long before the limitations period. *Id.* at 9a. The Tenth Circuit found "unpersuasive" the reasoning in *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), in which the Seventh Circuit rejected the argument that *Bazemore* made actionable a lower salary resulting solely from pre-limitations discrimination. *Id.* at 11a.

According to the court below, the purported *Bazemore* exception applies only to wages and not to any other benefits. Thus, it distinguished the Eleventh Circuit's decision in *Carter* v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), which held a discrimination claim untimely, on the ground that it concerned disparate *dividend* checks resulting from an employer's pre-limitations discriminatory stock option policy, not *paychecks* as in this case. App., *infra*, 9a.

The court of appeals also held that Goodwin is entitled to recover backpay for a period extending two years prior to the time she filed her charge with the EEOC, rejecting GM's contention that she should be entitled to no more than 300 days worth of backpay. App., *infra*, 12a. The court cited no statutory basis for its decision, instead relying on a prior Tenth Circuit case stating that such a two-year rule

"strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past." *Ibid.*

Finally, the court of appeals ruled that Goodwin had established a prima facie case of discrimination and, although GM had articulated a legitimate nondiscriminatory reason for the challenged salary disparities, Goodwin had raised a material factual issue as to whether GM's reasons were pretextual. App., *infra*, 15a-16a. Accordingly, it overturned the grant of summary judgment in GM's favor. *Id.* at 17a.[2]

REASONS FOR GRANTING THE WRIT

The allegedly discriminatory acts on which Goodwin primarily relies — improper pay reductions in 1980 and 1987-88, a failure to promote in 1983, placements at improper grade levels in 1987 and 1988, and insufficient pay raises between 1994 and 1997 — all took place more than 300 days prior to the date that Goodwin filed her discrimination charge with the EEOC. The court of appeals' ruling, that an actionable Title VII claim accrued with each paycheck no matter how long ago the discriminatory conduct that resulted in the challenged pay rate occurred, cannot be reconciled with the established principle that the residual effects or consequences of discriminatory acts that occurred prior to the limitations period are not actionable.

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[2] The court of appeals and the district court accepted Goodwin's factual allegations for purposes of resolving GM's motion for summary judgment. GM will vigorously contest many of her assertions if this case proceeds to trial.

The language from *Bazemore* on which the court of appeals relied does not support a different rule where the lingering effects are pay disparities. In *Bazemore*, the discrimination claims were actionable because the employees' paychecks reflected a policy of discrimination that, although initiated prior to the applicability of Title VII, was actively engaged in after Title VII became applicable. Thus, the paychecks at issue in *Bazemore* were not simply the lingering effects or inevitable consequences of pre-Title VII discrimination but rather reflected an ongoing discriminatory practice of the employer. The absence of such ongoing discrimination during the limitations period led the Seventh Circuit in *Dasgupta* to hold that the plaintiff's pay discrimination claim was time-barred, a conclusion rejected by the court below.

Moreover, even if it were proper to devise unique timeliness rules to govern wage discrimination claims, that would not authorize backpay awards extending beyond the 180- or-300-day limitations period prescribed by Congress, as the court below held. This too is an issue that has divided the courts of appeals and that requires this Court's intervention to ensure a uniform application of federal law.

The conflict over the proper scope of *Bazemore* and its applicability to particular types of discrimination claims is widespread and continues to spawn inconsistent enforcement of the Section 706(e) statute of limitations. Resolving this conflict will permit this Court to clarify the timeliness standard for discriminatory wage claims. A clear and consistent standard will remove the confusion and uncertainty that now confronts employees and employers at the threshold of the Title VII process and that inevitably

resurfaces in court if the initial EEOC charge ripens into a Title VII claim.

I. The Tenth Circuit's Decision Allowing Pay Discrimination Claims Without Regard To The Time Of The Alleged Discrimination Conflicts Sharply With Decisions Of Other Courts Of Appeals.

The ruling below — that pay discrimination claims, unlike other discrimination claims, are actionable even if they arose entirely from discriminatory acts that occurred prior to the limitations period — conflicts with a decision of the Seventh Circuit in a virtually identical case and with decisions of other federal courts.

In *Dasgupta v. University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), the Seventh Circuit held that a salary discrimination claim was time-barred for failure to comply with the Section 706(e) filing requirement. In the decision below, Judge Shadur criticized Judge Posner's *Dasgupta* opinion for not holding that the plaintiff's salary discrimination claim "constitute[d] a recurring violation during the limitations period." App., *infra*, 10a.

The *Dasgupta* decision is on all fours with this case. The plaintiff, a professor at a state university, filed a charge with the EEOC in 1995, contending that acts of pay discrimination between 1974 and 1987, followed by neutrally applied pay raises, resulted in his salary being lower than that of his peers during the 300-day limitations period. 121 F.3d at 1140. Although his raises were the same as his peers, he claimed that the early acts of discrimination forced him to start from a lower base and

thus to receive a lower salary during the limitations period in violation of Title VII. *Ibid.*

The Seventh Circuit held that the plaintiff's charge was untimely. Citing this Court's precedents, Judge Posner explained that "an untimely Title VII suit cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier." That is because "[a] lingering effect of an unlawful act is not itself an unlawful act [and thus] does not revive an already time-barred illegality." Reviving the pre-limitations violations, the court concluded, "would make employers pay compensation for violations that were no longer actionable and would thus unravel the statute of limitations." *Dasgupta*, 121 F.3d at 1140.

Judge Posner distinguished cases like *Bazemore*, "where the illegal act is repeated during the limitations period," from cases "at the opposite pole," like *Dasgupta*. In *Dasgupta*, "[t]here were no new violations during the limitations period" but merely "a refusal to rectify the consequences of time-barred violations. It is not a violation of Title VII to tell an employee he won't get a raise to bring him up to the salary level that he would have attained had he not been discriminated against at a time so far in the past as to be outside the period during which he could bring a suit seeking relief against that discrimination." 121 F.3d at 1140. The Seventh Circuit subsequently reaffirmed this principle, holding that "the continued receipt of lower paychecks does not revive past allegedly discriminatory conduct." *Snider* v. *Belvidere Township*, 216 F.3d 616, 618 (7th Cir. 2000). And, in a related context, the Federal Circuit favorably cited *Dasgupta* in holding that continuing

"monetary effects" do not constitute "separate violations or render the original violation continuing." *Bosley* v. *Merit Sys. Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998).

The court below found the *Dasgupta* opinion "unpersuasive" in light of *Bazemore*. App., *infra*, at 11a. But the conflicting approaches of the Tenth and Seventh Circuits reflect more than just a disagreement about how to apply *Bazemore*. The Seventh Circuit sought to reconcile this Court's precedents by finding a common principle, namely, that a Title VII claim requires affirmative discrimination during the limitations period, not just neutral conduct, lingering effects, and a refusal to rectify those effects. The Tenth Circuit subdivided this Court's precedents by subject matter, focusing on a purportedly "crucial distinction" between discrimination claims based on pay as opposed to all other aspects of employment. *Id.* at 7a. This difference of opinion about the meaning of the Title VII statute of limitations has caused considerable confusion in the federal courts.

A recent Title VII case following *Dasgupta*'s approach is *Tademe* v. *St. Cloud State Univ.*, 2001 WL 1584593 (D. Minn. Dec. 10, 2001). In *Tademe*, the plaintiff filed a discriminatory salary charge with the EEOC in 1999. He claimed that, due to his race, he was placed in a lower salary grid than a peer when the two were hired in 1991, resulting in his receiving a lower salary than his peer during the limitations period. The court granted the defendant's motion for summary judgment, explaining that "[e]ven if defendant discriminated against plaintiff in placing him at [a] lower step when he was initially hired in 1991, this violation did not occur within the limitations period." *Id.*

at *5. The court, relying on this Court's precedents, rejected the plaintiff's argument "that each paycheck is a new discriminatory act for statute of limitations purposes," noting that the initial discriminatory decision "was not a repeated and on-going decision made by defendant" and that "the effects of this decision [do] not constitute a continuing violation." *Ibid.*

Other courts, too, have rejected the notion that pay discrimination claims are governed by different timeliness rules than other employment discrimination claims. For example, in *Williams* v. *Munoz*, 106 F. Supp. 2d 40 (D.D.C. 2000), the court explained that this Court "limited" its "actionable paycheck" statement in *Bazemore* to cases involving discriminatory acts "occurring within the statutory period." Thus, the district court reasoned, *Bazemore*'s "separately actionable" ruling does not apply to paycheck differentials occurring during the limitations period that are merely the "current consequences" of a discriminatory promotion decision prior to the limitations period. *Id.* at 43. See also *Niedermeier* v. *Office of Max S. Baucus*, 153 F. Supp. 2d 23, 29 (D.D.C. 2001) (*Bazemore* applies "when a discriminatory system is in place," making "each discriminatory act pursuant to that system [a] new act of discrimination").

Several courts have agreed with the Tenth Circuit that *Bazemore* establishes a special rule for pay discrimination claims, but they generally take a different approach. Whereas the Tenth Circuit in this case rejected a "continuing violation" analysis (App., *infra*, 7a), other courts of appeals have upheld the timeliness of discriminatory pay claims on the ground that "in a Title VII

case claiming discriminatory pay, the receipt of each paycheck is a continuing violation." *Cardenas* v. *Massey*, 269 F.3d 251, 258 (3d Cir. 2001); see also *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 345-46 (4th Cir. 1994). On the other hand, the Second Circuit has held in an Equal Pay Act case that while each disparate paycheck may be separately actionable, *Bazemore* does not permit application of the "continuing violation" doctrine. *Pollis* v. *New Sch. for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997).

Two cases from the Eleventh Circuit illustrate the line between claims based on the lingering effects of pre-limitations discrimination and claims based on ongoing discrimination during the limitations period. These cases are irreconcilable with the Tenth Circuit's ruling here. In *Carter* v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), female employees received lower dividend checks than male employees because, prior to the limitations period, the employer had denied women an equal opportunity to purchase company stock. The district court found their suit timely under the "continuing violation" theory, but the court of appeals reversed. The Eleventh Circuit reasoned that the employer now operated its dividend program "in a neutral manner" and that the mens' larger dividend checks were but "the inevitable consequence of [the employer's] allegedly discriminatory practice of offering only men the opportunity to purchase stock." *Id.* at 1265. The court reached a different result in *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993), where the employer affirmatively retained a practice

of paying black employees less than similarly situated white employees during the limitations period. Because of the ongoing discrimination during the limitations period, the Eleventh Circuit held that the "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Id.* at 449.

Unlike the Tenth Circuit's decision in this case, these Eleventh Circuit decisions apply the proper distinction — between discrimination practiced *during* the limitations period and the effects of discrimination practiced *before* the limitations period. The attempt of the court below to explain away *Carter* as a *dividend check* case rather than a *paycheck* case (App., *infra*, 9a) is incoherent, lacks any support in the statutory text, and departs from the principles established in this Court's precedents.

II. The Tenth Circuit's Decision Cannot Be Reconciled With This Court's Decisions Treating The Date Of Discrimination As Dispositive For Statute Of Limitations Purposes.

In its prior cases addressing the timeliness of Section VII claims, this Court has made clear that a Title VII claim is barred unless the employer engaged in a discriminatory act or practice within the limitations period.

That issue was first presented in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the employer's ban on marriage by female flight attendants forced the respondent to resign in 1968. She did not file a claim with respect to that resignation and was rehired in 1972 with a seniority date commencing at that time. With any challenge to the 1968 resignation time-barred, she claimed that her

employer was liable for a "continuing violation" of Title VII because the seniority system treated her less favorably than males hired after her resignation and prior to her reemployment. *Id.* at 557. This Court ruled that her Title VII claim was untimely because the employer's seniority system operated neutrally. Although "the seniority system gives present effect to a past act of discrimination," the employer was "entitled to treat that past act as lawful" after the employee failed to file a discrimination charge within the applicable time limit. *Id.* at 558. As this Court put it, the pre-limitations act of discrimination was "merely an unfortunate event in history which has no present legal consequences." *Ibid.* Explaining that "mere continuity" is not enough to overcome the statute of limitations, this Court emphasized that "the critical question is whether any present violation exists." *Ibid.*

This Court reaffirmed that "present violation" principle in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). In *Ricks*, after a public college denied tenure to a Liberian professor, the college and professor entered into a one-year "terminal" contract providing that his employment would end upon termination. Although he filed a charge with the EEOC more than the applicable 180 days after the tenure decision, he claimed that the terminal contract constituted a "continuing violation" that extended the limitations period until it expired and he was terminated. This Court rejected that argument, holding that the loss of his teaching position was simply "a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. "[T]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most

painful." *Id.* at 258 (emphasis in original, citation omitted). See also *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (per curiam) (reaffirming that under *Ricks* "the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful") (emphasis in original).

This Court again focused on the time of the discriminatory acts, not on the lingering consequences of those acts, in *Lorance* v. *AT&T*, 490 U.S. 900 (1989). In *Lorance*, the plaintiffs were demoted under a neutrally applied seniority system that had been adopted with a discriminatory purpose when a collective bargaining agreement was executed prior to the limitations period. This Court rejected the plaintiffs' "continuing violation" argument, holding that the allegedly unlawful demotions were "wholly dependent on the alleged illegality of signing the underlying agreement" and that the execution date of that agreement therefore triggered the limitations period. *Id.* at 911. The remaining effects of the "discriminatorily adopted system" were "facially neutral" — not "facially discriminatory" — and thus not actionable under Title VII. *Id.* at 912 n.5.

Although *Bazemore* v. *Friday*, 478 U.S. 385 (1986), upheld the timeliness of a Title VII claim, it is perfectly consistent with these principles. *Bazemore* involved a state entity that, before Title VII became applicable to public employers in 1972, had a longstanding practice of segregating black and white workers and paying the black workers less. Although the employer had terminated its segregation policy by 1972, it continued to maintain its "discriminatory pay structure." *Id.* at 390-91, 396 n.6.

This Court held that the employer violated Title VII because it continued to engage in a discriminatory practice after 1972. This was not a case of mere lingering effects but of an affirmative policy after 1972 to pay black workers less than white workers.

> "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer *continued to engage in that act or practice*, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that *this discrimination was perpetuated after 1972*, liability may be imposed."

Bazemore, 478 U.S. at 395 (emphasis added).

This was the context in which this Court stated that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, *regardless of the fact that this pattern was begun prior to the effective date of Title VII.*" 478 U.S. at 395-96 (emphasis added). The italicized words (which the opinion below omitted) confirm that this Court was concerned with a "pattern and practice" that, though it began before 1972, was affirmatively maintained afterwards. It was the fact of continuing discrimination, not the fact that the discrimination took the form of a paycheck, that distinguished the situation in *Bazemore* from this Court's "lingering effects" cases.

That *Bazemore* is properly understood as a "continuing discrimination" case is made clear by *Bazemore*'s treatment of prior cases. As the *Bazemore* opinion describes *Evans*, "[b]ecause the employer was not engaged in discriminatory practices at the time [of] suit, there simply was no violation of Title VII." 478 U.S. at 396 n.6. Thus, it was the continuation of discriminatory practices at the time of suit that distinguished *Bazemore* from *Evans*. In both cases, the challenged practice caused pay disparities, but in *Evans* (as in this case but unlike in *Bazemore*) that practice had ceased prior to the limitations period. See also Lisa Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531, 536-537 (2000) ("the employer in *Evans* had terminated the discriminatory policy by the time of the plaintiff's suit, whereas the employer in *Bazemore* had not"). This Court in *Bazemore* also found support for its continuing discrimination approach in *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299 (1977). In *Hazelwood*, "[w]e explained that 'a public employer who from 1972 forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.'" *Bazemore*, 478 U.S. at 396 n.6, quoting *Hazelwood*, 433 U.S. at 309. The situation was quite different in *Bazemore*, where post-1972 decisions *were* made in a discriminatory way, distinguishing *Bazemore* from *Evans*, *Ricks*, *Lorance*, and this case, where only the residual effects of prior alleged discrimination remained during the limitations period.

In sum, the line between the *Evans-Ricks-Lorance* line of cases and *Bazemore* is this: If disparate treatment during the limitations period is but a lingering effect or an inevitable consequence of pre-limitations discrimination, the plaintiff has no actionable claim. But if that disparate treatment is itself a facially discriminatory act or practice, then the plaintiff may challenge it under Title VII. See 2 Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW 1355 (3d ed. 1996) (under *Bazemore*, "[i]f the employer has a formal rule or policy of disparate treatment, and *the system is maintained into the charge-filing period*, the system or practice may be attacked") (emphasis added).

This is a case of lingering effects and consequences, not of continuing discriminatory policies or practices. Goodwin's claim is that GM made several discrete decisions (long before the limitations period began to run) regarding work assignments, promotions, pay levels, and raises, which resulted in her receiving paychecks lower than her peers during the limitations period. Those paychecks were not the result of any affirmative discriminatory conduct within the limitations period, such as the *Bazemore* employer's continuing imposition of its facially discriminatory pay policy. The lack of any discriminatory employment decisions by GM after November 26, 1997, the commencement of the limitations period, led the court of appeals to reach back to ad hoc employment decisions from the 1980s and early 1990s to support its conclusion that Goodwin's lower salary during the limitations period violated Title VII. See App., *infra*, 3a-5a, 14a-15a. But as in *Evans*, "[b]ecause the employer was not engaged in discriminatory practices at the time [of] suit, there simply

was no violation of Title VII." *Bazemore*, 478 U.S. at 396 n.6.

The view of some courts, including the court below, that *Bazemore* reflects a unique timeliness rule for disparate paychecks rather than the established rule for discriminatory practices has led to unnecessarily broad formulations that bear no logical relationship to the facts in *Bazemore* or to the actual cases confronting the courts. Review of this case will permit this Court to ensure that the timeliness of pay discrimination claims is treated in the same manner as the timeliness of other Title VII discrimination claims.

III. This Court Should Also Resolve A Significant Circuit Conflict Over The Period Of Time For Which Backpay Is Available Under Title VII.

The Tenth Circuit's additional ruling that Goodwin is entitled to backpay for the two-year period preceding her EEOC filing (App., *infra*, 12a) sharply conflicts with the position of the Eighth Circuit. The Eighth Circuit limits backpay awards to the 180- or 300-day charge filing period. "[T]he damages recovery period for federal employment discrimination claims in this circuit is the same as the period in which a plaintiff must file her claim." *Madison* v. *IBP, Inc.*, 257 F.3d 780, 796-97 (8th Cir. 2001) (recognizing circuit split), petition for cert. filed, No. 01-985 (Dec. 19, 2001).

The Tenth Circuit's contrary ruling cannot be reconciled with Section 706(e). Even if Goodwin has a timely Title VII claim, there is no reason why she should be entitled to two years' worth of backpay. As in other contexts, even where a lawsuit is timely because the defendant committed

an overt act within the limitations period, the plaintiff may not "recover for the injury caused by old overt acts outside the limitations period." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). The holding of the court below would reward Goodwin for being dilatory and would further deprive the Section 706(e) limitations period of practical significance.

The Tenth Circuit's backpay ruling was inconsistent with its own liability ruling. If each paycheck received by Goodwin was a "fresh violation" of Title VII, as the court below held (App., *infra*, 9a), Section 706(e) required her to bring an EEOC charge within 300 days of that violation. Thus, one charge filed with the EEOC would sweep in 300 days' worth of checks. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971) (damages for each violation are available only for the limitations period triggered by that violation). By instead entitling her to two years' worth of backpay, the court of appeals more than doubled the backpay allowed by Section 706(e). Accepting this case for review will enable this Court to resolve the conflict over this issue and instruct the federal courts as to the proper limit on Title VII backpay awards.[3]

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[3] The court below did not rely on Section 706(g) of Title VII, which provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). In any event, that provision was enacted in response to the EEOC's then-position that back pay could extend back to the effective date of Title VII. See H.R. Rep. No. 92-238, at 65-66 (1971). Section 706(g) continues to cap recovery of backpay where equitable considerations toll or delay accrual of the limitations period.

IV. This Court's Review Is Needed To Maintain Consistency In The Formulation Of Title VII Timeliness Rules.

Adverse employment decisions generally result in lower pay throughout an employee's career. If each succeeding paycheck provided a fresh basis for a Title VII claim, as the court of appeals held, employees could routinely revive stale claims and thereby nullify the statute of limitations.

The proper application of the Section 706(e) statute of limitations to pay discrimination claims is an important issue affecting millions of employees and employers as well as state and federal fair employment agencies. Exceptions of the type formulated by the court below, even if well intentioned, undermine the purposes of Title VII. Title VII's timeliness and other procedural requirements "are not to be disregarded by courts out of a vague sympathy for particular litigants" because "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984).

Statutes of limitations are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). They ensure "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Young* v. *United States*, 122 S. Ct. 1036, 1039 (2002). This case, with one of GM's primary witnesses dead and another retired (see *supra* n.1), highlights the

unfairness of forcing GM to respond to claims of alleged discrimination that occurred decades ago.

In providing that discrimination charges "*shall* be filed" with the EEOC within 180 or 300 days of the allegedly discriminatory act (42 U.S.C. § 2000e-5(e)(1)), Congress considered and balanced the competing policies of prompt investigation of claims and effective protection against discrimination. It enacted Section 706(e) "to encourage a potential charging party to raise a discrimination claim before it gets stale, for the sake of a reliable result and a speedy end to any illegal practice." *Edelman* v. *Lynchburg College*, No. 00-1072, slip op. at 5 (Mar. 19, 2002). Section 706(e) restricts the "protection of the civil rights laws to those who promptly assert their rights" and protects against "the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. By requiring prompt filing of a charge with the EEOC, Congress also sought to encourage the prompt resolution of employment discrimination *charges* before they ripen into employment discrimination *lawsuits*. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764 (1998) (Congress intended to "promote conciliation rather than litigation in the Title VII context").[4]

The "very purpose" of statutes of limitations is to "make it impossible to enforce what [a]re otherwise

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[4] Employment discrimination lawsuits take up an ever-increasing portion of the federal courts' docket, having tripled between 1990 and 1998. U.S. Dept. of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, fig. 1, http://www.ojp.usdoj.gov/bjs/abstract/crcusdc.htm.

perfectly valid claims." *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979). The "harsh statute of limitations" that Congress enacted "has created pressure to evade it, and evasions always confuse the law." Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 56 (Autumn 1986). The decision below was just such an attempt to evade the law. It did not rest on one of the established exceptions to strict filing requirements based on equitable considerations, such as fraudulent concealment or the discovery rule. See *Baldwin County*, 466 U.S. at 151. Instead, it rested on a judge-made distinction between pay and other types of discrimination that has no basis in the statutory text. The charge-filing period is the "acceptable delay" established by Congress, which gave "no indication" that it considered other delays to be "equally acceptable." *International Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). Concerns about the unfairness of the limitations period enacted by Congress must be addressed by Congress, not by judicially created exceptions to unambiguous statutes. See *Kubrick*, 444 U.S. at 117 (when Congress has established a specific limitations period, courts "are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims").

"[T]he legal rules fashioned to implement Title VII should [be] consistent with other Title VII policies." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Clear and consistent rules governing the timeliness of discrimination claims are critically important for both employers and employees. Employers will never obtain the repose that

Section 706(e) was designed to provide if they face a proliferating series of inconsistent exceptions, one for pay, another for dividends, another for seniority, and still others for discharges, downgradings, and unfavorable references. See *Hamilton* v. *1st Source Bank*, 928 F.2d 86, 88 (4th Cir. 1990) (en banc) ("a perceived difference between discriminatory discharge claims and discriminatory pay claims" for accrual purposes is "a distinction without a difference"). Employees, who often are not represented by lawyers when they file an EEOC charge, have an even greater need for a clear timeliness rule. Such a rule should be consistent with the statutory language and provide that Title VII claims are timely only where discriminatory acts or practices — as opposed to mere lingering effects or inevitable consequences of pre-limitations discrimination — occurred during the 180 or 300 days prior to the filing of a charge with the EEOC. Cf. *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (per curiam) (a "clear general rule" governing the timeliness of appeals will prevent litigants from being "required to guess at their peril the date on which the time to appeal commences to run").

The court below sought to have it both ways, holding both that each paycheck creates a "separately actionable" Title VII claim *and* that it is part of "a continually recurring series of violations." App., *infra*, 8a. By calling each paycheck "separately actionable," it sought to avoid this Court's precedents forbidding Title VII claims based solely on pre-limitations conduct. But because Goodwin offered no proof of discrimination with respect to any such actionable paycheck, the court of appeals had to reach back to allegedly discriminatory acts that occurred long before

the limitations period. See App., *infra*, 15a. By relying on a "continually recurring series" of pay disparities resulting entirely from pre-limitations discrimination, the court below sought to accomplish just what this Court's precedents forbid — imposing liability where there was no discriminatory conduct during the limitations period.[5]

The implications of the Tenth Circuit's decision are startling. Most acts of sporadic discrimination, whether they concern job classifications, promotions, seniority, or some other aspect of employment, result in the employee's receiving lower pay than if the discrimination had never occurred. In each such case, a discriminatory decision early in an employee's career could become a Title VII claim decades later merely because the employee's pay never caught up to that of promoted peers. Employees should not be able to hold onto potential discrimination claims indefinitely, "sleeping on their rights." *Klehr*, 521 U.S. at 187. That would effectively vitiate the statute of limitations for all discrimination affecting employee pay. By viewing paychecks as a "continually recurring series of

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[5] The court of appeals summarily concluded that Goodwin "had no way of knowing" of the pay disparities about which she complains. App., *infra*, 11a. But under the court of appeals' approach, Goodwin's discovery of the disparities or lack thereof is irrelevant. Even if she knew of the claimed violation years ago, each paycheck would provide her with a fresh chance to sue. In fact, Goodwin had complained about her pay to GM officials at least as early as 1996 (see *supra* p. 6), leading the district court to find that she had been on notice of GM's alleged salary discrimination for "at least two years before she filed a charge with the EEOC." App., *infra*, 42a.

violations," the court of appeals stretched Congress's 300-day statute of limitations into one at least as long as the employee's career. Review by this Court is required to remove this threat of near-indefinite liability based on an incoherent distinction between pay and other forms of employment discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this case should be held pending this Court's decision in *National R.R. Passenger Corp.* v. *Morgan*, No. 00-1614.[6]

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[6] A grant of certiorari is appropriate because *Morgan* does not implicate the "separately actionable paycheck" exception relied on by the Tenth Circuit.

Respectfully submitted.

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